Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The purpose of this remand proceeding is for the FCC to "determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." Critically, nothing in the Supreme Court's decision upsets the decidedly pro-competitive purpose of Section 251(c)(3)'s network element requirement, and nothing strips the Commission of its authority to mandate unbundled network elements ("UNEs") in order to promote competition. Indeed, the Court's instruction to define UNEs with reference to the "objectives of the Act" requires the Commission to do so.

In these Comments, CompTel recommends that the Commission address the Court's concerns regarding the standard applied to UNEs without disrupting the pro-competitive results sought in the *Local Competition Order*. It should do so by adopting a uniform, national list of UNEs to be unbundled, which are determined by a common sense reading of the "necessary" and "impair" requirements designed to promote competition by lowering entry barriers.

The Commission must be guided at all times by recognition that principal goal of the 1996 Act is to ensure that *all* pro-competitive entry strategies may be explored. Section 251(c)(3) creates a wholesale market entry option (one which is provided without regulatory obligation in competitive telecommunications markets) for competitors. The Act does not require entrants to own facilities, and although facilities deployment certainly is the long term objective of most CLECs, the Act does not favor such entry over the UNE option. Accordingly, the Commission's interpretation of the "necessary" and "impair" standards must give substance to these standards without forcing carriers into a facilities-deployment model.

CompTel proposes that the impairment standard be interpreted to require for non-proprietary elements, there must be a *material* difference, either in cost, time to provision or in the number or scope of customers that can receive the service, derived from the use of ILEC UNEs as compared to externally supplied elements. Similarly, the necessary standard, which applies only in the limited circumstances when an element is "proprietary in nature," should be interpreted to mean impairment, *plus* a material loss in functionality without access to the proprietary component of an network element. To protect against unnecessary claims of proprietary elements, the Commission should establish presumptions that elements subject to industry standards are not proprietary and limit claims of proprietary elements to those situations in which access to the element or component will disclose customer-specific information *other than* that which a carrier would receive from the carrier-customer relationship, or elements that disclose a method or procedure protected by ILECs' own intellectual property rights

It is important to understand that the impair (or necessary) standards will be met unless and until a functioning wholesale market develops for the provision of network elements. No such market exists today, and one will not exist until ILEC provisioning systems are modified to make an externally supplied element fully *interchangeable* with the ILEC element in all material respects, including cost, ability to combine and scope of deployment.

Application of the necessary and impair standards yields a national list of UNEs in furtherance of Congress' nationwide pro-competitive policy framework. This list should include all of the elements previously identified in Rule 319, with several modifications to clarify the utility of UNEs for the provision of advanced telecommunications services. Specifically, the Commission should (1) clarify that access to local loops encompasses all technically feasible transmission media, including high capacity loops (DS1, DS3, OC12, etc), xDSL loops, and dark fiber, (2) modify the loop definition to permit CLECs to designate any technically feasible termination point for the loop, (3) clarify the local switching and transport UNEs to make clear they apply to packet networks, and (4) explicitly mandate unrestricted combinations of UNEs, including UNE-P and Extended Loops.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments on the *Second Further Notice of Proposed Rulemaking* ("*FNPRM*") in the above-captioned proceeding.[1] With over 335 members, CompTel is the principal national industry association representing competitive telecommunications carriers. CompTel's member companies include the nation's leading providers of competitive local exchange services and span the full range of entry strategies and options. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

In these Comments, CompTel urges the Commission to lower barriers to local entry and to encourage the provision of integrated telecommunications service packages by adopting a uniform, national list of unbundled network elements ("UNEs") to be provided everywhere. The central question for the Commission in determining whether to mandate the availability of a UNE should be whether the UNE will promote the rapid development of

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1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (1999)("*FNPRM*").

competition by a multitude of providers, *i.e.*, is availability of the UNE "rationally related to the goals of the [1996 Telecommunications] Act."[2] Thus, CompTel advocates that the Commission conclude that a requesting carrier would be "impaired" by a denial of access to a UNE if use of an externally supplied element as compared to use of the incumbent local exchange carrier's ("ILEC") element exhibits a material difference in either cost, time to provision service, or the number or scope of customers to whom the service would be provided. Similarly, the "necessary" standard, which would apply only in limited circumstances, is met if the carrier would experience a material loss in functionality as a result of the absence of the proprietary element and if a requesting carrier would be impaired. Unless and until a functioning competitive market for the supply of wholesale network elements develops, either the "necessary" or "impair" standards will be met with respect to the features and functionalities integrated into the ILEC network.

CompTel submits that application of this standard compels the availability not only of the elements previously identified by the Commission, but also of elements useful for the provision of digital subscriber line ("DSL") and other data services. For loops, switching and the other elements listed in Rule 319, use of an externally supplied alternative materially impairs a competitive local exchange carrier ("CLEC"), due principally to the fact that ILEC provisioning systems are not currently designed to provide interchangeability between integrated elements (*i.e.*, UNEs) and externally supplied elements performing the same functions. In addition, CompTel recommends several changes to the definitions of loops, switching and the network interface device ("NID") to ensure nondiscriminatory access to high capacity loops (including dark fiber), DSL equipped and DSL capable loops, and packet switching functionalities.

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2 *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734 (1999).

Furthermore, experience since the Telecommunications Act of 1996 ("1996 Act" or "Act")[3] conclusively demonstrates that lack of access to UNE combinations, including the UNE Platform ("UNE-P"), impairs a CLEC's ability to provide service in both business and residential markets.

Finally, CompTel is hopeful that, over time, the availability of wholesale alternatives will develop, and that some UNEs will no longer need to be required by the Commission. Indeed, for some network elements such as operator services and directory assistance, a wholesale market is emerging, albeit still limited by a need to rely on ILECs for critical inputs that are not yet available on a nondiscriminatory basis. Nevertheless, in order to prepare for the time when a carrier will not be impaired by denial of access to an ILEC element, the Commission should develop reasonable procedures for removing UNEs from the mandatory list. Although CompTel agrees that states can play an important advisory role in the process, the ultimate decision must be made by the Commission. CompTel recommends that the Commission establish procedures for examining changes in UNE availability, which should include a formal role for the state commissions. Moreover, the Commission must adopt reasonable transition rules for any "soon to be retired UNEs" so as not to overturn reliance interests or to disrupt customers served using such arrangements.

I. <u>THE AVAILABILITY OF ILEC UNES FURTHER THE ACT'S COMPETITIVE GOALS BY PROVIDING A WHOLESALE MARKET ENTRY STRATEGY</u>

The central goal of the 1996 Act is to establish competitive options for providers of local telecommunications services.[4] As the Commission has recognized repeatedly, the Act

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3 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

4 *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a "procompetitive deregulatory national framework designed to accelerate rapid private (continued…)

explicitly requires three different market entry strategies – service resale, use of UNEs (wholesale entry) and facilities-based provision of service-- to be available.[5] These options replicate market entry strategies available to carriers in competitive telecommunications markets, such as long distance.

The Act "neither explicitly nor implicitly expresses a preference for one particular entry strategy."[6] Instead, its goal is to eliminate all barriers to entry and to lower entry costs wherever possible, in order to maximize the potential competitive benefits to telecommunications subscribers. In short, the principal goal of the Act – and therefore, the Commission's primary obligation in implementing the Act– is to "ensure that *all* pro-competitive entry strategies may be explored."[7]

It is important to ensure the simultaneous availability of all three entry strategies. Each entry strategy has different strengths and weaknesses, and therefore is used for different purposes by different carriers (or in different circumstances by the same carrier). Moreover, the availability of all three entry strategies opens competition to the broadest array of providers and does not favor one type of service provider over another.

Service resale allows a carrier to enter at very low cost and often is the quickest method of entering a new market. However, service resale does not allow differentiation of service, nor does it allow an entrant to compete on value-added components. Moreover, service

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sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

[5] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 12 (1996) ("*Local Competition Order*").

[6] *Id.*

[7] *Id.*

resale also can carry with it other regulatory limitations, such as (in the case of resale under Section 251(c)(4)), the inability to provide other services (such as access) to one's own customers. As a result, service resale is typically suited to entrants that believe they have developed more effective or lower cost marketing methods, or simply are more focused on providing a *related* service that is better marketed in conjunction with the resold service.

Use of UNEs provides a wholesale market entry strategy. This option, like service resale, also lowers the cost of entry, but does so in a way that gives the provider greater control over the network and an ability to offer new product and pricing packages to the market. Under this strategy, a new entrant will purchase underlying facilities or capacity from existing providers and utilize that capacity to provide its own service. The wholesale capacity can either be combined with other facilities leased or deployed by the entrant, or can be assembled into a stand-alone retail service consisting wholly of facilities leased from others. Use of UNEs allows a carrier to enter a market quickly, with little sunk costs, and to ramp up its customer base and traffic volumes over time.

A wholesale option (such as use of UNEs) encourages two types of service providers. First, wholesale facilities can be used by initial entrants, either those new to the industry entirely or those new to a particular geographic market. These carriers utilize wholesale facilities as a substitute for deployment of their own facilities, in order to speed their entry to a market or to lower the risk of underutilized or stranded facilities. Typically, wholesale facilities are only a temporary strategy for such carriers, and they gradually replace them with their own facilities.

Second, a wholesale option can be an efficient entry strategy for value-added providers who offer new or more effective ways of using existing infrastructure or technology.

These providers typically have an innovative product or technology which, when used with existing capabilities, produces greater benefits to customers.[8] Value-added providers have no economic reason to duplicate existing infrastructure – and often are less skilled at doing so than are the incumbent providers. These entities simply need the underlying capability so that their new or innovative product can operate properly. For a value-added provider, wholesale entry can be a temporary entry strategy (to be replaced with the entrant's own facilities) or more permanent, if, for example, there are no significant benefits to vertical integration of the underlying facility and the value-added services.[9]

Finally, depending upon the legal, operational or economic barriers, facilities-based entry also is an entry strategy. Facilities-based entry is the most capital intensive entry strategy, and it also is the most time-consuming. It is used principally by mature carriers or entrants with the ability to subsidize significant up front losses from revenues from related endeavors.

Critically, in competitive telecommunications markets, each of these three options is available simultaneously, in essentially every geographic area. It is not the case that as a market becomes more competitive all providers migrate to a facilities-based strategy. In fact, the opposite is true. As the market becomes more competitive, one or more *wholesale* suppliers develop, and entry via wholesale facilities (*i.e.*, UNEs) expands. Just as tellingly, the wholesale

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[8] This type of entry is illustrated by CompTel member companies such as Z-Tel Network Services, Inc. ("Z-Tel"), a carrier that focuses on the development of a sophisticated application control system that "overlays" the traditional network to provide customers an integrated voice, data and messaging environment. Essentially, Z-Tel uses the existing ILEC infrastructure in combination with its software in a creative manner to offer customers a new and innovative product. As Z-Tel's President, David Malfara, explains, use of the ILEC local exchange network is a critical component of Z-tel's application. *See Appendix C.*

option in competitive areas is founded on a principle of convenience – while wholesale capacity may be *available* in a number of forms and increments, providers never *require* that their customers purchase capacity in its most skeletal form or in a manner where its usefulness is diminished.

Moreover, the availability of wholesale facilities promotes the expansion of competition. As wholesale facilities are available, it allows more competitors to enter a market. More competitors leads to more innovation and competition in software-related applications and the packaging of retail services. Many of the new competitors ultimately become facilities-based providers in their own right, thereby further increasing the availability of wholesale services in the market. For example, the Commission has credited the wholesale market as being "*a major reason* for the increased competition in the long distance services market."[10] The wholesale market enabled long distance carriers to enter the market at minimum cost, and to deploy their own facilities gradually as their needs and economic efficiency permit.

In the local market, the Act compels ILECs to be the wholesale providers because they are the only carriers in a position to do so. The ILEC networks enjoy "economies of density, connectivity, and scale" that cannot be duplicated by competitors, now or in the foreseeable future.[11] As has been widely acknowledged, and scarcely could be contested with a straight face, ILECs are "one of the last monopoly bottleneck strongholds in

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9 Value added services would also include packages combining other related services, such as long distance service.

10 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, ¶ 42 (Sept. 14, 1998) (emphasis added).

11 *FNPRM*, ¶ 27 (citing *Local Competition Order*, ¶ 11).

telecommunications."[12] In order for competitors to have a wholesale entry strategy in the local market today, they must obtain access to UNEs.

II. **THE NECESSARY AND IMPAIR STANDARDS MUST BE INTERPRETED IN A MANNER THAT FURTHERS USE OF THE WHOLESALE MARKET ENTRY STRATEGY THROUGH UNES**

In reviewing the Commission's interpretation of Section 251(d)(2), the Supreme Court expressed concern that the Commission's explanation of the applicable standard (1) disregarded the availability of outside elements; and (2) equated "impairment" with *any* increase in cost or decrease in service quality that results from the failure of a carrier to obtain access to an element, no matter how trivial.[13] Discussing the level of impairment, the Court expressed concern that a trivial increase in cost might trigger the UNE requirement, even if, in the Court's example, an entrant's anticipated profits are reduced from 100 percent to 99 percent. However, the Court acknowledged that, in a situation where providers are offering service at marginal cost, any increase in cost (or decrease in quality) would constitute an impairment.[14]

Because it was not clear to the Court that the Commission applied the correct standard, it vacated Rule 319 and instructed the Commission "to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[15] The interpretation the Commission applies to the "necessary" and "impair" standards must be consistent with the Act's purpose of promoting all three methods of competition, and, in particular, must affirmatively promote the wholesale market entry strategy through the use of UNEs.

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12 *Local Competition Order*, ¶ 4.

13 *AT&T Corp.*, 119 S.Ct. at 736.

14 *Id.* at 735.

15 *Id.* at 736.

A. "IMPAIRMENT" REQUIRES ONLY THAT THERE BE A MATERIAL DIFFERENCE DERIVED FROM THE USE OF ILEC UNES AS COMPARED TO EXTERNALLY SUPPLIED ELEMENTS

On remand, the Commission can address the Court's two concerns directly and without disrupting the pro-competitive results sought in the *Local Competition Order*. With respect to the "impair" standard, CompTel proposes the following definition:

> *A carrier is impaired if a failure to obtain access to a network element would impose a material increase in cost, a material delay, or would materially restrict the number or scope of customers likely to receive the service any requesting carrier seeks to offer. Impairment would arise if, for example, any one of the following applied:*
>
> *(1) a denial would materially increase the cost to provision, combine, or otherwise utilize a requested network element in connection with other elements of the ILEC's network or the network of an alternative provider,*
>
> *(2) a denial would cause a requesting carrier to experience a material delay to provision, combine or otherwise utilize a network in connection with other elements of the ILEC's network or the network of an alternative provider, or*
>
> *(3) a network element exhibits material economies of scale and scope.*

This rule satisfies both of the concerns raised by the Supreme Court.

1. The Proposed Rule Answers the Court's Concern that Trivial Differences Might Require an Element to be Unbundled

In determining whether to require unbundled access to a non-proprietary network element under the impairment standard, the Commission must develop, pursuant to the Court's ruling, *some* limiting standard. As the Commission noted in the *Local Competition Order,* the term "'impair' means to [ ] become worse or diminish in value."[16] The Commission explained that "an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises."[17] In order to respond to the Court's concern, however, the Commission must ensure that a negligible or inconsequential increase in cost, or decrease in quality, resulting from a denial of an element does not automatically constitute impairment.[18]

CompTel's proposed definition incorporates a materiality test into the impairment standard that responds to the Court's concern that trivial differences in cost would render an ILEC element a UNE. By incorporating a materiality test in the impairment standard, the Commission can ensure that its limiting standard is substantive, not trivial or insignificant.[19]

Although the materiality standard does not provide a precise quantification that can be applied ex ante to all circumstances, it does require that there be a significant or identifiable difference between the alternatives such that a requesting carrier would make a rational decision to use the ILEC element instead of another alternative.[20] In the *Local*

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16 *Local Competition Order*, ¶ 285 (citing Random House College Dictionary).

17 *Id.*

18 *AT&T Corp.*, 119 S.Ct. at 734.

19 As a starting point, however, CompTel proposes a rule that a carrier's ability to provide telecommunications service will be *presumptively* impaired by denial to a particular network element *unless* the Commission makes certain findings with respect to the provisioning and geographic availability of the network element as comparable in quality, cost and efficiency to that of the ILEC. *See* CompTel Proposed Rules, attached hereto as *Appendix A*. If this presumption does not apply, then the Commission would apply the impairment standard that incorporates the materiality test.

20 Any "close calls" should be resolved in the favor of the requesting carrier in order to promote the Act's goal of rapid development of competition. In such cases, the danger of improperly adding a UNE is inconsequential for, if a requesting carrier truly is not impaired, it presumably will prefer to supply its own element (or obtain it wholesale from

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Competition Order, the FCC defined impair using an ordinary and natural meaning of the word. Rather than discarding this approach entirely, CompTel proposes that the Commission should continue to give the term "impair" its ordinary meaning.

CompTel encourages the FCC to add some substance to the degree of impairment required under the standard, however. In other words, the Commission should continue to interpret impair to mean to "diminish in value," only quantify that diminishment as "material" as opposed to "trivial." As Justice Souter noted in dissent, "impairment" is an ambiguous term, which can mean any degree of impact depending upon its context.[21] The Commission's responsibility here is to match that degree of impact to the Act's pro-competitive objectives. This is not hard to do. The Commission can respond to the Court's concern by maintaining its common sense definition of impairment, with a materiality standard added.

Recently, the FCC reached a similar result when it interpreted the term "impair" in the context of the over-the-air reception provisions of the 1996 Act.[22] There, the impairment concept was given a clear meaning as any regulation, ordinance, covenant or requirement that: (1) unreasonably delays or prevents installation, maintenance or use; (2) unreasonably increases the cost of installation, maintenance or use; or (3) precludes reception of an acceptable quality signal.[23]

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others) rather than rely on its largest competitor. Therefore, the likely result from improperly including a UNE will be that the element is available but unused.

21 *AT&T Corp.*, 119 S.Ct. at 739 (Souter, J., dissenting).

22 *See In the Matter of Otto and Ida M. Trabue Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, Memorandum Opinion and Order, CSR-4974-O ¶ 17 (rel. May 19, 1999); Pub. L. 104-104, Title VII, § 207, Feb. 8, 1996, 110 Stat. 153 (requiring the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of . . . direct broadcast satellite services").

23 *See* 47 C.F.R. § 1.4000(a).

This impairment standard is similar to CompTel's proposed interpretation of the UNE unbundling impairment standard in this proceeding. With respect to over-the-air reception devices, the Commission recognized that an entity is "impaired" by delays, cost increases or decreases in quality. These are the same factors CompTel proposes be considered in evaluating impairment with respect to UNEs. Moreover, in both standards, trivial differences are ignored. Like the concept of reasonableness in the context of over-the-air reception devices, the concept of materiality in CompTel's proposed UNE standard achieves the statute's objectives without erecting a barrier that is nearly impossible to meet or reducing the standard to an absurdity.

Importantly, CompTel's proposed impairment standard does not diminish a CLEC's incentives to deploy its own facilities. A rational new entrant will desire to reduce the burden of negotiating with, and relying upon, its primary competitor – the ILEC – for a critical input in order to do business. To this end, the CLEC will strive to replace this reliance with its own facilities as soon as possible. As the Commission told the Supreme Court in its Reply Brief, under a proper pricing regime (i.e., at Total Element Long Run Incremental Cost ("TELRIC") levels), "all new entrants, including those with access to the platform, will have powerful incentives to develop their own facilities whenever that would contribute to efficiency and consumer welfare."[24] That is, the availability of UNEs will not prevent CLECs from opting to construct facilities whenever it would be efficient to do so (*i.e.*, where traffic volumes justify substitution of one's own facilities, or where the new entrant needs new facilities to offer different or more efficient services.)[25]

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24 *See FCC v. Iowa Utils. Bd.*, Case No. 97-826, et al, Reply Brief for the Federal Petitioners and Brief for the Federal Cross Respondents at 41 (U.S. Oct. Term 1997).

25 *See Id.* at 34, citing G. Stigler, *The Theory of Price* (4th Ed. 1987).

Importantly, Justice Breyer's observation that meaningful competition flows from the unshared portions of an enterprise does not dictate that the ILEC network not be made available.[26] Rather, innovative and meaningful competition is possible, and in fact desirable, by requiring the ILEC to make that network available. For a new entrant that is a value-added provider, innovation occurs principally because the provider is *not* required to duplicate the ILEC UNEs, and is able instead to share the underlying network functionalities.[27] For example, Z-Tel Network Services, Inc. ("Z-Tel") is a competitor that focuses on the development of a sophisticated application control system that "overlays" the traditional network to provide customers an integrated voice, data and messaging environment.[28] The fundamental architecture is modeled after the basic Advanced Intelligent Network (AIN) framework. Essentially, Z-Tel uses the existing ILEC infrastructure in combination with its software in a creative manner to offer customers a new and innovative product.[29] This is innovation and competition made possible only where Z-Tel is not required to duplicate the ILEC network, but instead is able to share this essential resource. Indeed, if Z-Tel were unable to share the ILEC's network, its new application would be delayed.

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[26] *See AT&T Corp.*, 119 S.Ct. at 754 (Breyer, J., dissenting).

[27] Such value-added would be realized, for instance, if the new entrant offered an existing service at a lower price, in a package with another service, or supported by a different billing or customer-support process. Value added, by definition, is in the "eye of the consumer" that will choose its local provider.

[28] *See* Affidavit of David Malfara, President of Z-Tel Network Services, Inc., appended hereto as *Appendix C*.

[29] That is, Z-Tel innovates through end user services and software applications, not through improved local network technologies.

2. The Impairment Standard Requires the Consideration of Whether Externally-Supplied Elements Are Interchangeable With ILEC Elements

The impairment standard also addresses the Court's concern that the test should examine alternatives available outside of the ILEC network. These alternative sources include self-provisioning, other CLECs or non-carrier service providers. However, the theoretical availability of a network element is not enough to preclude an element from being a UNE. In the *Local Competition Order*, the Commission rejected the argument that if a requesting carrier could, in theory, obtain an element from an outside source, then the ILEC need not provide the element.[30] This reasoning would nullify Section 251(c)(3). Indeed, Congress recognized that the duplication of an ILEC's network could not only delay entry, but also could be inefficient and unnecessary. Thus, Congress set the framework for competitors to be able to enter the local market through the purchase of UNEs. Moreover, for all practical purposes, the ILECs' existing infrastructure cannot be duplicated in the foreseeable future. For the most part, the ILECs' monopoly attributes -- economies of density, connectivity and scale – remain intact.[31]

Similarly, one can imagine many ways of replicating an ILEC functionality through creative use of other telecommunications services. But Congress did not intend to mandate Rube Goldberg solutions to these problems. To illustrate this point, Justice Souter uses, and the majority notes the validity of, the following example: without a stepladder, one's ability to install a lightbulb is impaired, even though one could stand on a chair, a milk can or books instead.[32] These latter options are not really reasonable options at all.

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30 *Local Competition Order*, ¶ 287.

31 *Local Competition Order*, ¶ 11 (noting that the local competition provisions of the Act require that these economies be shared with entrants.)

32 *AT&T Corp.*, 119 S.Ct. at 739 (Souter, J., dissenting); *see id.* at 735 n.11 (majority opinion).

For external elements (*i.e.,* facilities obtained outside the ILEC network), the Commission must consider how the element will work in connection with other elements provided by the ILEC and must consider material differences in cost, delay and scope in interconnecting and using the external element. CompTel submits that these factors will always lead to the conclusion that a requesting carrier is impaired until a functioning wholesale market develops for network elements.[33]

In order for a wholesale market to develop, at least two changes must happen from today's conditions. First, external elements must become *interchangeable* with internal elements. This means not only that it is *possible* to interconnect and use an external element with ILEC elements, but also that the network architecture and provisioning systems are such that it is as easy to connect and use UNEs with the ILEC network as it is to connect and use the ILEC's element itself. ILEC architectures are not open today, and the focus of operational support systems ("OSS") development thus far has only been on automating the service order process, not on providing the automated provisioning of elements, particularly elements that are to be used in combinations with the externally supplied elements of CLECs. Second, there must be evidence of wholesale competition. That is, there must be evidence that multiple providers are holding themselves out to carriers on a wholesale basis and that sufficient excess capacity exists in these networks to present a meaningful alternative to the ILECs' provisioning of wholesale elements.

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[33] Following a wholesale availability standard in this instance would, in large measure, replicate the Commission's actions over the past decades to promote competition in customer premises equipment ("CPE"), information services, and long distance services. Beginning with *Carterfone*, the Commission consistently has sought to promote competition by *expanding* the ability of competitive providers to gain access to the underlying telecommunications inputs necessary to provide services.

Notably, interchangeability depends principally on the type of element and the manner in which it operates within a telecommunications network. It is not likely to vary much based on the technical qualities of a network from one region to another, but instead is very much dependent upon the way in which ILEC provisioning systems are designed according to the principles of openness and interoperability. In order to achieve interchangeability, ILEC systems must provision and connect network elements to each other through means that eliminate all material differences in cost, time to provision and functionality between use of an ILEC network element and use of a competitively-supplied alternative.

With respect to cost, interchangeability requires that there be no material increase in development and deployment costs or material decrease in economies of scale between an ILEC network element and a competitive alternative. Alternative network elements must be accessible without significant modification to the competitive carrier's network and must be priced in a way that does not materially exceed the ILECs' charges.

With respect to functionality, interchangeability requires that (1) customers not be able to distinguish between the service offerings that use an alternative network element from those that use an ILEC network element (for example, that there be no material decrease in quality); and (2) the use of a competitive alternative not result in a material delay in the introduction of a competitive service offering in the market that adversely affects the competing carrier's service deployment strategy or consumer acceptance of the service.

B. THE "NECESSARY" STANDARD

Clearly, the necessary standard is closely related to impairment. In ordinary parlance, asking whether an element is necessary can be the flip side of asking whether a carrier is harmed or impaired by not having the element. Although the necessary test is distinct from the impairment test, and applies only to *proprietary* elements as discussed below, the two standards are linked in that the concept of materiality and the factors that determine impairment play a role under each standard. Where they differ is only in the type of impairment that need be shown.

CompTel's proposed necessary standard is as follows:

> *Access to a network element that has a proprietary component is necessary if a material loss in the functionality of the network element would result without access to its proprietary characteristic and if the requesting carrier's ability to provide the intended service would otherwise be impaired in accordance with paragraph (b) below.*

1. Definition of Elements which are "Proprietary in Nature"

Initially, it is important to note that the "necessary" standard is the exception, not the rule. Section 251(d)(2)(A) makes clear that it applies only to elements that are "proprietary in nature."[34] Indeed, the necessary standard is irrelevant for elements that are not proprietary. The Commission has reached the conclusion that the necessary standard applies only to proprietary elements, and the Court's decision does not alter this conclusion in any way.[35] Thus, for non-proprietary elements, the only standard that is applicable is the impairment standard.

In its *Local Competition Order*, the Commission defined elements that are "proprietary in nature" as those "with proprietary protocols" or "containing proprietary information."[36] Despite the Court's silence on the issue of the Commission's interpretation of the term "proprietary," the Commission seeks comment on the meaning of proprietary.[37]

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[34] 47 U.S.C. § 251(d)(2)(A).

[35] *See FNPRM*, ¶ 19; *Local Competition Order*, ¶¶ 277-88; *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 at 811 n. 31 (8th Cir. 1997), *granted sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998), *aff'd in part, rev'd in part*, 119 S.Ct. 721 (1999); *AT&T Corp.*, 119 S.Ct. at 734-36.

[36] *Local Competition Order*, ¶ 282.

[37] *FNPRM*, ¶ 15.

As a starting point, CompTel urges the Commission to define a presumption that any functionality that is subject to accepted industry standards cannot be proprietary, regardless of how the ILEC chooses to provide the element. CompTel agrees that ILEC signaling protocols that adhere to Telcordia (formerly Bellcore) standards are not proprietary because they use industry-wide, as opposed to ILEC-specific, protocols.[38] Similarly, network elements should be considered non-proprietary if the interfaces, features and capabilities sought by the requesting carrier are defined by recognized industry standard-setting entities, defined by Telcordia, or otherwise available from other vendors.[39]

In the event that an element does not fall within this presumption, CompTel submits that "proprietary" should be defined more narrowly and in such a way as not to create incentives for the ILECs to litigate classification or to raise questionable claims of proprietary aspects. The Commission must guard against potential ILEC attempts to claim proprietary status simply as a delaying tactic or in order to escape their unbundling obligations. Unless the term is defined in such as way as to make it the exception, not the rule, litigation over whether elements are "proprietary in nature" will be interminable.

Accordingly, CompTel proposes that the Commission limit elements which are "proprietary in nature" to those that disclose customer-specific information *other than* that which a carrier would receive from the carrier-customer relationship, or elements that *disclose* a method or procedure protected by ILECs' own intellectual property rights. Specifically, CompTel proposes that elements which are "proprietary in nature" be defined as follows:

> *A network element may be*
> *considered to be proprietary if the element:*

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[38] *Local Competition Order*, ¶ 481.

[39] *FNPRM*, ¶15.

> *(i)* *discloses customer-specific information other than that which a carrier would receive from the carrier-customer relationship; or*
>
> *(ii)* *discloses a method or procedure protected by the ILEC's own intellectual property rights.*

It is important to note that receiving the benefit of a new process is not enough under part (ii) of the proposed definition. In order for the element to be proprietary under the statute, the purchaser of the UNE must actually receive an unfair advantage by utilizing the element in terms of gaining the benefit of the proprietary process or method. In other words, the necessary standard only should apply when proprietary aspects of an element *must be disclosed* when it is unbundled, as opposed to merely be utilized. If unbundling an element will reveal a proprietary methodology or process that is protected by a registered patent or copyright, only then should it be considered proprietary. Again, the difference here is between merely obtaining the benefit of a proprietary methodology and revealing the methodology itself. In the latter case, the element is proprietary and the application of the necessary standard is appropriate.

2. The Definition of "Necessary"

In the rare circumstances where a UNE is "proprietary in nature," CompTel submits that necessary should be defined essentially as "impairment, plus." That is, necessary should be interpreted to mean that (1) the purchaser of the UNE will be impaired (the same impairment standard as discussed above) by a lack of access; *plus* (2) the UNE will experience a material loss in functionality without the aspect that is claimed to be proprietary.

In the *Local Competition Order*, the Commission examined the Section 251(c)(6) collocation equipment requirement and the meaning of the word "necessary." In so doing, the FCC adopted a broad reading of the term "necessary." The Commission concluded that ILECs are required to permit the collocation of equipment *used* for interconnection or access to UNEs.[40] This interpretation of necessary – "used" or "useful" as opposed to "indispensable" – is a broad interpretation that the Commission believed would most likely promote fair competition consistent with the purposes of the Act.[41] In its March 1999 *Advanced Services First R & O*, the Commission relied upon this definition in expanding collocation options for competitive carriers.[42] The Commission specifically noted that its implementation of the requirement in Section 251(c)(6) that ILECs permit collocation of "necessary" equipment was not challenged before the Supreme Court.[43] Thus, the Commission's interpretation of "necessary" as "used or useful" remains in effect.

Congress' use of the same term in Section 251(d)(2) should be given the same interpretation. The Commission has interpreted "necessary" to mean a prerequisite to competition, such that without access to certain proprietary elements, the ability of competitors to compete would be impaired or thwarted.[44] CompTel believes that it is reasonable to interpret both necessary and impair using common sense definitions and in a manner broad enough to promote UNE competition as envisioned in the Act.

C. MEANING OF SECTION 251(D)(2)'S INSTRUCTION TO "CONSIDER" THESE FACTORS

The Commission has requested comment on whether, in addition to the necessary and impair standards discussed above, the agency has authority to consider factors *other than* the

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40 *Local Competition Order*, ¶ 579.

41 *Id.*

42 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking ¶ 28 (rel. Mar. 31, 1999)("*Advanced Services First R & O*").

43 *Id.*, ¶ 28 n. 57.

44 *See Local Competition Order*, ¶ 282.

necessary or impair standards in determining whether a network element should be unbundled.[45] CompTel suggests that it may be necessary for the Commission to require the unbundling of an element even if the necessary and impair standards are not met. That is to say, the necessary and impair standards are not exclusive. The Commission may consider other factors such as the promotion of important statutory goals.

The Commission notes in the *FNPRM* that the requirement that the agency "consider" a particular factor means only that the Commission must "reach an express and considered conclusion" about that factor's importance.[46] Generally, the Commission is not required to attribute "any specific weight"[47] to a factor. The Supreme Court requires that, in considering the necessary and impair standards, the Commission must give "substance" to the standards.[48] Accordingly, CompTel suggests that the Court's concerns about the substance of the necessary and impair requirements would be addressed if satisfaction of the standards results in a presumption that the network element will be made available on an unbundled basis. Beyond this presumption, CompTel believes that *failure* to meet the necessary and impair standards should not end the analysis.

Section 251(d)(2) states that the Commission shall "consider, *at a minimum*," whether access is necessary or whether lack of access would impair a requesting carrier's ability to provide service.[49] The application of case law in this instance confirms that Section 251(d)(2)

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45 *FNPRM*, ¶ 30.

46 *FNPRM*, ¶ 29.

47 *Time Warner Entertainment Co., L.P. v. Commission*, 56 F.3d 151, 175 (D.C. Cir. 1995).

48 *FNPRM*, ¶ 29; *AT&T Corp.*, 119 S.Ct. at 735.

49 47 U.S.C. § 251(d)(2)(A),(B) (emphasis added).

"does not restrict the factors" that the Commission may consider.[50] Further, as noted above, the FCC is not required to give a factor – here, the necessary and impair standards - any "specific weight," or, indeed, any weight at all.[51] Pursuant to Section 251(d)(2), then, the Commission has the discretionary authority, after it has determined that a UNE does not meet the test, to expand its consideration to include various other factors.

The various other factors that the Commission may, in its discretion, choose to consider include the goals of the Communications Act, as amended by the 1996 Act. For example, it may be advisable at some point for the Commission to require the provision of certain UNEs to further the 1996 Act's express mandate of ensuring the promotion of universal service in Section 254. Or, it may become necessary for the Commission to use its discretion to require the provision of certain UNEs to further the development and deployment of advanced services pursuant to Section 706. Importantly, CompTel is not suggesting that the Commission's discretionary authority to require the provision of a UNE to advance these purposes is unlimited, or that it should be exercised lightly. However, in some instances, specific statutory mandates of the Communications Act may only be furthered by the FCC's discretionary implementation of the Act's network element unbundling obligations.

III. THE FCC SHOULD APPLY THE NECESSARY AND IMPAIR STANDARDS TO YIELD A NATIONAL LIST OF UNES.

Evaluation of impairment on a central office by central office basis is a war of attrition in which consumers are destined to lose. The implementation of such a procedure would surely cause the costs of entry to skyrocket, and carriers would be delayed in entering the local market. To avoid such an impediment to competition, CompTel recommends that the

50 *Central Vermont Railway, Inc. v. Commission*, 711 F.2d 331, 335 (D.C. Cir. 1983).

51 *Time Warner*, 56 F.3d at 175.

Commission adopt a uniform, national list of UNEs that will be provided everywhere. In addition, the Commission should evaluate impairment (or necessity, if an element is found to be proprietary in nature) based on the circumstances of a carrier most likely to utilize a wholesale entry strategy. By ensuring that UNEs are available whenever this type of carrier is impaired, the Commission opens the local market to the largest number of entrants and also promotes the goal of universal availability of telecommunications services.

A. Uniform National Rules Are Needed to Achieve Section 251's Goals

In the *FNPRM*, the FCC tentatively concluded that it "should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis."[52] There is no reason for the Commission to stray from adopting this conclusion. Nationwide rules would be consistent with the Commission's Local Competition proceeding from its inception and would serve Congress' "national policy framework" goal.

The benefits of national UNE rules, as previously recognized by the Commission, are many. In the *Local Competition Order,* the Commission concluded that "national rules are highly desirable to achieve Congress' goal of a pro-competitive national policy framework for the telecommunications industry."[53] The Commission identified several advantages to national rules, especially as a source of consistency and certainty that reduces barriers to competitive entry.[54]

Specifically, the Commission recognized that nationwide unbundling rules serve to equalize the bargaining positions of interconnecting parties, especially since many CLECs

52 *FNPRM,* ¶ 14.

53 *Local Competition Order*, ¶ 62.

54 *See id.*, ¶¶ 53-62.

seek to enter nationwide or regional markets.[55] It also noted that uniform nationwide rules would avoid re-litigating the same issue in dozens of jurisdictions and would reduce the administrative burdens placed on state commissions by facilitating more efficient arbitrations.[56] Importantly, the Commission refuted the argument that it was attempting to impose a uniformity unintended by Congress. To the contrary, the Commission's rules will provide a national baseline for terms and conditions in arbitrated agreements, "consistent with the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251."[57] Nothing in the Court's decision alters this reasoning and inevitable conclusion in favor of national rules.

The Court's decision reinforces the Commission's authority to establish national rules and highlights that the promotion of local competition is a *national* goal, placing the FCC in the primary position of national rule implementation. Although it is true that the Court instructed the Commission to consider factors (such as the availability of elements outside the ILEC network) which might vary according to the circumstance, this instruction does *not* mandate a hodge-podge of UNE availability. In other words, the Court disagreed with the Commission's interpretation of the necessary and impair standards, not with the fact that the agency compiled a nationwide UNE list. In fact, the Commission's original impairment standard *also* relied on factors that could differ according to the circumstance – specifically, the availability of alternative capabilities within the ILEC's network. Yet, the Court never questioned the logic of the FCC specifying a list of uniformly available UNEs.

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55 *See id.*, ¶ 55.

56 *See id.*, ¶ 56.

57 *Id.*, ¶ 60.

In fact, by making local competition a national priority, the Act requires a primary role for the FCC to ensure the goal is achieved. Indeed, it would defeat the very purpose of making local competition a national priority if the FCC were immediately to cede control of this objective back to the states. As the Court noted, Congress had "unquestionably" shifted regulation from the state to the federal level.[58] Simply put, nothing in the Court's decision alters the Commission's conclusion that "certain national rules are consistent with the terms and goals of the statute. . . . [I]t is reasonable to identify a minimum number of network elements that incumbent LECs must unbundle and make available to requesting carriers pursuant to the standards set forth in sections 251(c) and (d) . . ."[59] The Commission should do so.

The Commission recently exercised such authority to issue nationwide collocation rules. In the *Advanced Services First R&O*, the Commission concluded that nationwide rules are necessary to remove barriers to entry and to accelerate the provision of advanced services.[60] Following the lead of state commissions in New York and Texas, the FCC acted quickly to expand the availability of cageless and shared cage collocation arrangements nationwide. In so doing, it followed the "states as laboratories" model. These states showed that the lack of collocation was hindering competition *and* that easier and less expensive collocation was possible. The FCC then extended these benefits nationwide. Without these national rules, competition would have been delayed (and occasionally denied) by repetitious state-by-state consideration of the same issues.

As it did in the *Advanced Services First R&O*, the Commission should make room for use of a best practices approach here. CompTel agrees with the *FNPRM* that, as with the

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58 *AT&T Corp.*, 119 S. Ct. at 730 n.6.

59 *Local Competition Order*, ¶ 54.

initial unbundling rules, state commissions should have the ability to add UNEs to the nationwide list of those that must be made available.[61] However, allowing states to rule on whether a particular element must be unbundled in the first instance would be inconsistent with the adoption of nationwide unbundling rules and would greatly diminish the value of such rules.[62]

B. Characteristics of a Requesting Carrier for Purposes of the Impairment Analysis

Although national rules should be adopted, a nationwide entry strategy need not be the paradigm which the Commission uses to evaluate UNEs. On the other hand, it also is true that the Commission should not apply its standards on a carrier-specific basis. Rather, the Commission should evaluate impairment from the perspective of the type of requesting carrier for which Congress created the UNE requirement in the first place. This requesting carrier should have all the attributes contemplated for Section 251(c)(3) network elements, and should be presumed to be utilizing UNEs to provide mass market services throughout an appropriately sized geographic market. By ensuring that UNEs are available for this type of requesting carrier, the Commission will promote rapid entry by as many carriers as possible, thereby furthering the pro-competitive goals of the Act.

Section 251(c)(3) permits "any requesting carrier" to obtain access to network elements, on a nondiscriminatory basis, "for the provision of a telecommunications service."[63]

(…continued)

60 *See Advanced Services First R&O*.

61 *See FNPRM*, ¶ 14. Obviously, states must follow standards and, more importantly, may *not* impose other limitations on UNEs not included by the FCC.

62 As discussed below, the states should play a substantial role in the *removal* of specific UNEs from the nationwide list.

63 47 U.S.C. § 251(c)(3).

In addition, the Act permits requesting carriers to combine network elements with each other "in order to provide [any] telecommunications service."[64] Further, the Commission found that requesting carriers need not have *any* facilities of their own: the statute permits them to provide service exclusively through the use of ILEC UNEs.[65] Indeed, in upholding the FCC's so-called "all elements" rule, the Supreme Court expressly rejected a facilities-based requirement for the use of UNEs. The Court explained:

> [W]e think that the Commission reasonably omitted a facilities-ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in § 251(c)(3) that incumbents provide access to 'any' requesting carrier.[66]

By making network elements available to "any" requesting carrier, and by declining to impose a facilities based requirement on UNE availability, Section 251(c)(3) broadens the pool of potential competitors that may enter local telecommunications markets, and as a result, all telecommunications markets.[67]

The Commission's model of a requesting carrier for purposes of its impairment analysis must reflect these broad purposes of the UNE requirement. First, clearly, the requesting carrier should be a new entrant to the local market. The entrant should be presumed to be a start-up entity, which will have an incentive to maximize revenues as soon as possible and which will have no incentive to delay entry into a market.

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64 *Id.*

65 *Local Competition Order,* ¶ 328 ("We conclude, therefore, that Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications services."; *see* 47 C.F.R. § 51.307.

66 *AT&T Corp.*, 119 S. Ct. at 736.

67 *Local Competition Order*, ¶ 4 (local competition "is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing providers to enter all markets") (italics in original).

Second, the requesting carrier should not be presumed to have any local exchange facilities of its own. A Requesting Carriers has a right to utilize UNEs exclusively in its provision of service, and the Commission's model should enable a requesting carrier to exercise this right. As a corollary, this principle requires that the Commission evaluate impairment assuming that a requesting carrier will attempt to use the functionality (whether obtained from the ILEC or supplied externally) in conjunction with other piece-parts of the ILEC network. In other words, impairment must evaluate whether this element can be combined with other ILEC elements in an nondiscriminatory manner.

Third, the requesting carrier should be presumed to be attempting to enter the market on both a business and residential basis. Section 251(c)(3) gives requesting carriers the right to provide any type of service, whether it is business or residential. By asking whether a requesting carrier will be impaired in providing either class of service, the Commission ensures Section 251(c)(3) is available for service to all consumers.

Fourth, the requesting carrier should be presumed to be providing a scope of services at least as extensive as those supported under Section 254's universal service policies. Universal service is one-third of the Commission's "competition trilogy" implemented after the 1996 Act. The policies of the trilogy are interrelated, and the Commission's actions implementing the interconnection provisions must also further the Act's universal service goals. The Commission made clear in the *Universal Service* proceeding that eligible carriers may provide supported services using network elements, which count as the carrier's "own facilities" for purposes of Section 254.[68] Like an eligible carrier for universal service purposes, a requesting carrier should be presumed to be providing service on a nondiscriminatory basis to all eligible end users. Therefore, for purposes of evaluating impairment, the Commission should presume that a requesting carrier intends to offer service on a mass market basis to residential and business subscribers.

Finally, the service area the requesting carrier seeks to serve should be sufficiently large to reflect the type of area this carrier would be expected to serve. In its competition trilogy, the Commission identified two geographic areas that may be useful for this purpose. First, in the context of universal service, the Commission required eligible carriers to provide service throughout a relevant study area, which generally speaking is no larger than a particular state. Second, the Commission used a market trading area ("MTA") for purposes of determining the local calling areas of wireless providers. Either of these two geographic areas would be well suited for the impairment analysis also. Both areas are consistent with the likely strategy of a mass market carrier, who cannot enter a market on an end office by end office basis. Moreover, both standards promote competition by ensuring that requesting carriers can provide service throughout as large a geographic area as possible.

It is this type of carrier for which the Commission has an obligation to ensure that UNEs are available. The existence of a specific carrier with other capabilities that arguably make it better able to provide service without ILEC network elements does not impact the analysis. Indeed, whatever characteristics the Commission assumes a carrier to possess will operate as a cut-off for competitive entry: those with those characteristics and those that possess more abilities will enter the market, but those with lesser capabilities will be excluded. Thus, if the Commission forced other carriers to obtain the capabilities possessed by a specific carrier

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(…continued)

[68] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order ¶ 154 (1997).

that possesses more abilities, it would inevitably reduce the number of competitors that can enter the market, thereby reducing competition as well. The pro-competitive goals of the Act are best promoted by ensuring that the bar for competitive entry is established at a place where those carriers most in need of UNEs (*i.e.*, those possessing the characteristics described in this section) have the option available.

IV. APPLICATION OF THE NECESSARY AND IMPAIR STANDARDS COMPELS RETENTION OF ALL OF THE UNES DEFINED IN SECTION 319, WITH MODIFICATIONS TO ENSURE UNES ARE USEFUL FOR THE DELIVERY OF BROADBAND DATA SERVICES.

In the *Local Competition Order* the Commission identified seven network elements that, pursuant to Section 251(d)(2), were subject to the unbundling obligations of Section 251(c)(3). Application of the "necessary" and "impair" standards as proposed herein compels retention of all of these UNEs, and, further, the modification of certain of the UNE definitions in order to ensure their application to the delivery of advanced broadband services.

CompTel member companies, regardless of size or market entry strategy, need access to *all* of the UNEs previously identified. This is true for an entity like Golden Harbor, which has deployed local exchange facilities in 30 cities but need ubiquitous access to UNEs in order to extend its "footprints" to locations where its *customers* need service.[69] This also is true for small local exchange carriers such as ATX or Birch Telecom, who cannot afford the time, or cost of collocation and other expenses necessary to rely solely on extension of switches.[70] Moreover, this is true for software applications providers such as Z-Tel, which has deployed a

69 Affidavit of Jerry Jones, ¶ 4 (*Appendix F*).

70 Affidavit of Martin J. Arias, ¶ 5 (*Appendix D*); Affidavit of Richard L. Tidwell, ¶ 5 (*Appendix E*).

sophisticated applications control system as are "overly" to work in conjunction with the ILEC local networks.[71]

A. The Commission Must Retain All of the UNEs Originally Listed in Section 319, With Some Modifications

1. Local Loops

In the *FNPRM*, the Commission states its "strong expectation" that under any reasonable interpretation of the necessary and impair standards of Section 251(d), the local loop will be subject to the unbundling obligations of Section 251(c)(3). CompTel wholeheartedly concurs. Access to the local loops is a cornerstone of the ability of new entrants to compete with incumbents. Indeed, Congress expressly recognized the importance of access to the local loop as a means of fostering competition by including the loop in Section 271: the competitive checklist requires Bell Operating Companies ("BOCs") to offer unbundled loops separate from switching as a precondition to entry into the in-region, interLATA services market.[72] By any reasonable conception, the local loop must be included in the list of network elements subject to Section 251(d)(2).

a. Description of the Element

In the *Local Competition Order* the Commission defined the local loop simply as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises." CompTel submits that the definition of the local loop must be refined, to facilitate entry into the local markets *and* enable CLECs to compete with incumbents on an equal basis as regards the provision of advanced services. Specifically, the Commission should modify the loop definition to: (1) permit CLECs to obtain

71 Affidavit of David Malfara, ¶¶ 2-3, 9 (*AppendixF*).

72 47 U.S.C. § 271(c)(2)(B)(iv); *see also Local Competition Order*, ¶ 377.

loops in any technically feasible transmission medium or capacity (*i.e.*, to obtain high capacity and xDSL loops); (2) clarify that a loop includes all necessary electronics attached to it (*e.g.*, includes a digital subscriber line multiplexer ("DSLAM") or other multiplexing equipment); and (3) permit CLECs to designate the termination point of a loop as any technically feasible termination (not just the main distribution frame).

First, the development of data applications dictates that the local loop element not be restricted only to voice grade POTS uses. Therefore, it is imperative that the Commission clarify that the local loop element encompasses all types of local loops, including ISDN loops (both PRI and BRI ISDN), xDSL capable (*i.e.*, "clean copper" loops), dark fiber loops and high capacity loops (DS1, DS3 and OC12 and higher).[73] These loops are pipelines over which advanced services are being transmitted today and increasingly will be in the future. CLECs need loops with these capabilities just as much as a voice-only provider needs a traditional loop. The FCC's loops definition should explicitly require the delivery of loops in any and all technically feasible transmission media and at all transmission capacities.

The second proposed change is necessary to clarify that ILECs are obligated to provide loops which include the electronics integrated with the loop. Loop electronics, including ILEC-installed DSLAMs, are "features, functions, and capabilities that are provided by means of such facility or equipment" of the ILEC network, and therefore are expressly within the scope of

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[73] CompTel notes that many states have already established rates for many of the loop-types identified here. Consistent with the Commission's objective to adopt the "best in class" of state decisions, clarifying its rule to explicitly recognize these loop types would now be appropriate.

Section 251(c)(3).[74] Competitors will require access to these electronics to, for example, obtain loops which are passed through ILEC digital loop carrier ("DLC") systems.

Finally, the loop definition should be modified to permit requesting carriers to designate any technically feasible termination point within an ILEC central office (or its equivalent) for termination of the loop element. This modification will facilitate the combination of the loop with other elements -- such as switching capabilities -- in the most economical manner, and without the necessity of a collocation arrangement in the end office.

Accordingly, CompTel proposes the following definition of the local loop network element:

> the transmission capability (regardless of the transmission media involved, including unused transmission media such as dark fiber) between a requesting carrier-designated point in an incumbent LEC central office (or an equivalent location designated by the requesting carrier where the loop can be connected to other ILEC network elements, or the network facilities of another carrier) and an end-user customer premises.[75]

The loop element should encompass all features, functions, and capabilities of the underlying transmission facilities used to provision the local loop, and, further, wherever it is technically feasible, the incumbent must provide the loop configured in a manner to support the transmission specifications of the requesting carrier.[76]

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[74] 47 U.S.C. § 153(29)(definition of network element); *cf. Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 ¶ 52 (rel. Aug. 7, 1998).

[75] *See* CompTel Proposed Rule 319(a) (attached as *Appendix A*).

[76] CompTel Proposed Rules 319(a)(1), (4) (attached as *Appendix A*).

b. **Application of the "Impair" Standard**[77]

Application of the "impair" test to the local loop mandates that the Commission require that the loop be provided on an unbundled basis. First, it is clear that the model Requesting Carrier described *supra* in Section III.B (and, indeed, virtually every conceivable carrier operating today) would experience a material increase in cost if it were denied access to ILEC loops. The ILECs' networks of local loops are ubiquitous, having been built as a result of decades of monopoly provision of service. By virtue of their monopoly position, incumbents reap the benefits of substantial economies of scale and scope connected with the local loop, particularly with regard to shared assets and costs, existing customer base, and mature support infrastructure.

The model Requesting Carrier, by contrast, as the Commission notes in the *Local Competition Order,* without access to the existing loop with all of its scope and scale advantages, would be required to invest immediately in duplicative facilities in order to compete for customers. This type of investment is cost-prohibitive, and likely will remain so indefinitely. Even in the densely populated areas where some alternative construction is occurring, a Requesting Carrier would have to make a large initial sunk investment in loop facilities before having a customer base large enough to justify an expenditure of the required magnitude; this raises the competitor's cost of capital and, more significantly, increases the risks of entry exponentially. Although it is not impossible in these areas to built alternative loops, Requesting Carriers clearly face significantly higher costs which satisfy the materiality component of the impairment standard.

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[77] The FCC found that local loops are not proprietary in nature. *Local Competition Order*, ¶ 388. Therefore, only the impair standard is relevant.

For these same reasons, a lack of access to the unbundled local loop would materially delay entry by competitors into the market. As discussed above, the inordinate expense and effort that would be required to construct new loops would undoubtedly delay entry into the local markets. Specifically, for example, deployment of new infrastructure requires rights-of-way acquisition, a large capital investment, and time-consuming construction. Given the expense involved and the current state of competition (or lack thereof) in the local markets, few investors are inclined to fund a ubiquitous replacement of ILEC facilities; moreover, the time requirements involved with new construction would be prohibitive. In sum, the obstacles to new entry into the local markets are virtually insurmountable absent unbundled access to the local loop.

Finally, given the costs and other burdens of new construction of local facilities and the corresponding delays in, or downright obstacles to, entry into the local market, the number and scope of customers that will receive new, competitive services inevitably would be materially restricted unless new entrants have access to the incumbents' local loops. Moreover, even where new entrants would have the financial capability to construct new loop facilities, the competitive realities of their situation would result in their targeting only certain limited categories of customers. Accordingly, competition would develop only with respect to high volume users (such as businesses) and to premises with multiple customers (either business or residential), thereby enabling new entrants to maximize the profits from their investments.

2. Network Interface Device ("NID")

a. Definition of the Element

As before, the Commission should mandate that the NID be made available as a network element. When a requesting carrier purchases a local loop, the NID should be included at no separate charge (with the associated costs covered by the loop charge). However, the NID should also be available separately, if a competitor requests it.

CompTel proposes one modification to the definition of this network element. The Commission should define the NID as the cross-connect device used to connect loop facilities to inside wiring (the current definition), *and* include ILEC-owned inside wiring as part of the element.[78] Access to ILEC-owned inside wire – particularly access to ILEC riser cable in apartment buildings and other multiple dwelling units ("MDUs") – increasingly is being used as a barrier to CLEC competition. Many CompTel member companies are being denied access to ILEC-owned intrabuilding circuits by the ILEC (often with the cooperation of the building owner), which has the effect of barring CompTel members from providing competing services to residents of the building. The most effective way of dealing with the roadblock is to include ILEC-owned inside wire within the definition of the NID, so that competitors may obtain access to the customer by cross-connecting to the ILEC NID.

b. Application of the "Impair" Standard[79]

Like the local loop, because of the dedicated nature of the NID, competitive alternatives are not currently available on a wholesale basis. CLECs are unable to compete with the ILECs' scope, scale and timeliness advantages inherent to their ubiquitous integrated plants. Without access to the NID, the model Requesting Carrier would face increases in cost and delays to enter a market that would not only be material, but essentially cost prohibitive.

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78 *See* CompTel Proposed Rule 319(b)(1) (attached as *Appendix A*). In addition, the Commission clarify that the rule, as now written, entitles competitors to unrestricted access to the customer side of the NID, *without facing additional charges from the incumbent*.

79 No party has asserted that the NID is proprietary in nature. Moreover, because the NID is included within the loop element, the Commission has implicitly concluded that this element is not proprietary. *Local Competition Order*, ¶ 388.

When a competitor deploys its own loops, it must be able to connect its loops to inside wiring in order to provide viable competing service. In most cases, inside wiring is connected to the incumbent's loop plant at the NID. Accordingly, if Requesting Carriers are denied access to this element, they would be impaired in their provision of service. No customer will pay for duplication of existing intrabuilding wires, and building owners may bar such alternative in any event. The only practical alternative is use of the ILEC's facility (including the riser cable and other inside wire that it owns).

3. Local Switching

The Commission found in the *Local Competition Order* that access to unbundled local switching, and to tandem switching, was "essential for the provision of competing local service."[80] Indeed, Congress expressly highlighted the importance of competitive access to switching capability by including it in the Section 271 checklist that BOCs must satisfy in order to provide in-region interLATA services.[81] The provision of switching, whether local or tandem circuit switching or packet switching, on an unbundled basis satisfies the "impair" standard of Section 251(d)(2).

a. Definition of the Element

CompTel does not believe that any significant modifications in the Section 319 definition of either local switching capacity or tandem switching capacity are needed. However, for clarity, CompTel urges the Commission to add packet switching capability as a separate element in addition to circuit switching. Packet switching should be defined as the assembling,

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80 *Local Competition Order*, ¶ 420.

81 47 U.S.C. § 271(c)(2)(B)(vi); *see also Local Competition Order*, ¶ 410.

disassembling, addressing, conversion or routing of digital information in packet form.[82] This element should include all features, functions, and capabilities of the packet switching and routing device, including equipment used to multiplex and packetize such information. Inclusion of packet switching as a separate element is essential given the technological developments of the past four years.

In the Advanced Services Proceeding, the Commission recognized that, in order to fulfill the mandate of Section 706 and encourage competition among carriers to develop and deploy new advanced services, it is "critical" that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers.[83] To that end, the Commission reinforced its commitment to "removing barriers to competition" so that competitors are able to compete effectively with incumbents and their affiliates in the provision of advanced services.[84] Although it deferred action on various proposals that would require the unbundling of certain elements for the specific purpose of promoting advanced services, the Commission did expressly recognize the importance of packet-switched transmission of voice and data services.[85]

b. <u>Application of the "Impair" Standard</u>

In the *Local Competition Order*, the Commission expressly found that switch unbundling did not raise proprietary concerns under the agency's interpretation of Section 251(d)(2)(A).[86] Moreover, the Commission further found that even if switches were proprietary

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82 *See* CompTel Proposed Rule 319(c)(3) (attached as *Appendix A*).

83 *Advanced Services First R&O*, ¶ 2.

84 *Id.*, ¶ 3.

85 *Id.*, ¶¶ 5, 7.

86 *Local Competition Order*, ¶ 419.

in nature, access to unbundled switching would be "necessary" under Section 251(d)(2)(A).[87] CompTel submits that switching facilities still are not proprietary, and hence only the "impair" test is relevant to a determination of whether switches must be provided on an unbundled basis pursuant to Section 251(d)(2).

Local switching satisfies the impairment standard. First, denial of access to local switching will materially increase the cost to a Requesting Carrier and will materially delay its provision of service. As the Commission noted in the *Local Competition Order*, it ordinarily takes anywhere from nine months to two years to purchase and install a switch.[88] CompTel member company experience confirms this conclusion.[89] Moreover, in addition to the cost of obtaining the switch, use of non-ILEC switching requires substantial other costs, including the cost of collocating equipment in each end office where a carrier serves customers.[90] For one CompTel member, the costs of collocating exceeded $300,000 per end office in some areas.[91] CompTel's small carrier members simply lack the financial capability to utilize their own switching for all of the customers they intend to serve.

In addition, a wholesale market for switch capacity has not developed. For example, one CompTel member company, Birch Telecom, Inc., reports that although it would like to purchase wholesale switch capacity if it were available, it is unaware of any providers offering such capacity.[92]

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87 *Id.*

88 *Id.*, ¶ 411.

89 Affidavit of Martin J. Arias Aff., ¶ 5 (switch installation has taken almost two years and cost several million dollars); Tidwell Aff., ¶ 5 (switch installation cost an average of $4-6 million per switch and took up to 9 months).

90 Arias Aff., ¶ 5.

91 Tidwell Aff., ¶ 5.

92 Tidwell Aff., ¶ 5.

Most significant, however, would be the material restriction in number and scope of potential customers resulting from a lack of access to local and tandem circuit switches and packet switches. In order for a competitive LEC to penetrate into the local market to any great extent, both the cost of migrating a customer from an incumbent to a competitor and the timeframe for so doing must be minimized. As the Commission noted in the *Local Competition Order*, "new entrants will be disadvantaged if customer switchover is not rapid and transparent."[93] Local switching is far from interchangeable at this time. Indeed, as noted above, any use of one's own switch requires numerous collocation arrangements with the ILEC, which are both cumbersome and costly. Moreover, in order to utilize a local switch to serve a customer, a carrier must connect that switch to ILEC local loops on the line side of the switch and to ILEC transport elements on the trunk side. Under current ILEC conditions, these connections are done manually, and require significant time and resources to ensure that the combination is done correctly by the ILEC (and it often is not). As a result, the time to provision a customer using externally supplied local switching is materially longer than it would be to utilize ILEC local switching.

Before externally-supplied local switching can become useful for a mass-market application, it must have customer migration costs and capacity levels comparable to the PC-change level -- with migration costs substantially less than five dollars per line. To accomplish this, mechanized provisioning capabilities must be employed, which is possible only if such capabilities are software-based -- possible only with UNE switching and loop combinations.

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93 *Local Competition Order*, ¶ 421. Significantly, the Commission codified this requirement in rule 319(c)(1)(ii) that requires ILECs develop software-based switch provisioning systems with customer migration intervals equal to the PIC change process. Clearly, this rule is as critical today as it was three years ago and should be retained.

Further, as explained in the attached affidavit of David Malfara, access to existing switch capacity is essential to bringing innovative applications-based services to the mass market, whether business or residential.[94] The existing switches of the ILECs have a geographic reach and market penetration that is unparalleled – in effect, the customers served by these switches *define* the mass-market.[95] The only viable way to approach this market is to rely on these existing facilities to provide an entrant is basic local platform from which to offer its service. The critical value of the local switching network element is discussed further in a later section that addresses network element combinations.

4. Interoffice Transport

In the *Local Competition Order*, the Commission recognized the importance of competitive access to unbundled interoffice transmission facilities to the development of local competition, which is reflected in the fact that the 1996 Act requires BOCs to unbundle transport facilities before entering the in-region, interLATA market.[96] Accordingly, as demonstrated below, the provision of interoffice transmission facilities on an unbundled basis clearly satisfies the impair standard of Section 251(d)(2).

a. Definition of the Element

CompTel believes that the Commission's existing Section 319 definition of the interoffice transmission element is generally appropriate. CompTel proposes, however, that the Commission define packet transport as a separate UNE in order to ensure that competitors may

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94 Malfara Aff., at ¶¶8, 10.

95 Furthermore, to bring competitive AIN-based services to mass markets fundamentally requires access to switch triggers – triggers which are *only* available in conjunction with unbundled local switching. Thus, the future of competitive AIN services is inextricably linked to the availability of the unbundled local switching network element.

96 47 U.S.C. § 271(c)(2)(B)(v); *see also Local Competition Order*, ¶ 439.

provide advanced, packet-switched services without experiencing a material impairment in their ability to provide service. CompTel suggests that the Commission define "packet transport" as the transport of packetized information between, and including, two or more packet devices, or between interconnected transmission facilities which terminate at a packet device, including any intermediate routing, *without regard to the protocol or packet definition scheme involved*.[97] As discussed above with respect to packet switching, it is critical to the timely development and deployment of advanced telecommunications services that all carriers have competitive access to the facilities needed to provide such services to their customers.

b. Application of the "Impair" Standard[98]

The importance of interoffice transport is such that application of the impair standard clearly demonstrates that this element must be provided on an unbundled basis. First, access to the transport UNE will materially decrease the cost of entry for competitors. Although there may be alternative suppliers of transport in some areas,[99] those alternative sources are not many, and their networks are geographically limited. For a transport network to be a commercial substitute for that of the ILEC it must have a footprint of adequate dimension to meet the transport needs of its customers. If a potential customer must split its transport requirements between two providers, the customer loses traffic efficiency and gains additional administrative costs. Since the customer must obtain at least some of its needs from the ILEC in any event, it will only consider an alternative if its potential savings exceed these higher costs.[100]

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97 *See* CompTel Proposed Rule 319(d)(3) (attached as *Appendix A*).

98 Unbundled provision of interoffice transmission facilities does not raise any proprietary concerns. *See Local Competition Order*, ¶ 446.

99 *See Local Competition Order,* ¶ 441.

100 Of course, for some customers with specialized data needs, the diversity that is possible form using multiple providers is a primary goal for selecting a competitive provider.

(continued…)

In addition, and more significantly, unbundled access to ILEC transport facilities will increase the speed with which competitors can enter the market, and, further, reduce entry barriers by enabling new entrants to establish efficient local networks by combining their own interoffice facilities with those of the incumbent, thereby expanding their transport “footprint.” Further, access to interoffice transport facilities will vastly improve competitors’ ability to design efficient network architecture that is comparable in quality to that of the incumbent, and, importantly, to combine their own switching functionality with the incumbent’s unbundled loops. By entering the market on an expedited basis and being able to offer customers with service of a quality comparable to that of the incumbent, new entrants will be able to offer competitive services to a greater number of customers

5. Signaling and Call-Related Databases

In the *Local Competition Order*, the Commission recognized that access to signaling links, signaling transfer points, and call-related databases such as the LIDB, Toll Free Calling, and AIN databases, as well as the Service Management Systems necessary to use these call-related databases effectively, is critical to entry into the local markets and to the ability of new entrants to compete with incumbents on a comparable basis.[101] Indeed, the importance of signaling systems and related databases is reflected in Section 271, which requires BOCs to make these available on a nondiscriminatory basis as a precondition to entry into the in-region interLATA services market. In addition, the provision of signaling systems and call-related databases on an unbundled basis clearly satisfies the impair standard of Section 251(d)(2).

(…continued)

However, for purposes of applying the impair test, the Commission should assume a more typical, price conscious, customer.

[101] *See Local Competition Order*, ¶¶ 478-79.

a. Definition of the Element

CompTel has no suggested changes to make to the existing Section 319 definition of the signaling and call-related databases elements.

b. Application of the "Impair" Standard[102]

As noted above, the Commission found in the *Local Competition Order* that access to signaling systems and the related databases is critical to providing competing local exchange and exchange access services. Specifically, access to the incumbents' signaling systems and associated databases are crucial to the ability of competitors to offer the same services to customers as do the incumbents, on similar terms and under similar timing. CompTel notes in this regard that in the *Local Competition Order* the Commission found that alternative signaling methods would provide a lower quality of service;[103] the availability of these technologies has not changed since that order was released. Moreover, access to the incumbents' service management systems is necessary to enable new entrants to effectively use the call-related databases. In sum, lack of unbundled access to these elements would place competitors at a material disadvantage vis-à-vis incumbents: new entrants would be materially impaired if forced to develop their own capabilities immediately, which involve not only a substantial cost, but would materially delay competitors' entry into the local markets. This, in turn, would materially restrict the number of customers able to receive these services, which, moreover, would not be of a comparable quality to the services offered and provided by the incumbents.

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[102] Unbundled provision of signaling and call-related databases elements does not raise any proprietary concerns. *See Local Competition Order*, ¶¶ 480-81, 484, 486, 490.

[103] *See Local Competition Order*, ¶ 482.

6. Operations Support Systems (OSS)

a. <u>Definition of the Element</u>

CompTel has no suggested changes to make to the existing Section 319 definition of the OSS elements.

b. <u>Application of the "Impair" Standard</u>

The Commission found in the *Local Competition Order* that the "massive" operations support systems employed by incumbents, and the information those systems maintain and update to administer telecommunications networks and services, represent a significant and material barrier to entry.[104] Much of the information maintained by these systems is critical to the ability of new entrants to compete with incumbents using UNEs. Without access to, for example, available telephone numbers, service interval information, and maintenance histories, competitors would not be able to provide customers with comparable, competitive services, and hence they would have to operate at a material disadvantage with respect to incumbents.

Further, other information, such as the facilities and services assigned to a particular customer, is essential to a new entrant's ability to offer and provide competitive services to customers. If competitors are not able to perform the essential functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for UNEs in substantially the same time and manner as the incumbent, the competitor will be materially disadvantaged -- if not precluded -- from marketing to the incumbents' customers, providing comparable services, and, generally, competing in the local markets. Quite simply, new entrants do not have an alternative independent means of accessing this information, could not finance

[104] *Id.*, ¶ 516.

any such alternative access without material expense and delay to market, and must have access to the incumbents' operations support systems on an unbundled basis.

7. Operator Services/Directory Assistance

a. Definition of the Element

CompTel has no suggested changes to make to the existing Section 319 definition of the operator services and directory assistance elements.

b. Application of the "Impair" Standard[105]

In the *Local Competition Order*, the Commission found that unbundled access to the facilities and functionalities used by incumbents to provide operator services and directory assistance is necessary to facilitate competition in the local exchange market.[106] The Commission further found that such unbundled access is consistent with the intent of Congress: the 1996 Act imposes on BOCs as a condition of entry into the in-region interLATA services market the duty to provide nondiscriminatory access to directory assistance services and operator call completion services.[107] Customers expect to have access to these services from their telecommunications services providers, whether incumbent or new entrant, and, accordingly, competitors must have access to the incumbents' operator and directory assistance services on an unbundled basis in order to be in a position to serve the incumbent's customers on an equal and competitive basis. At this time, replication by competitors of the facilities and functionalities used by incumbents to provide operator services and directory assistance would involve substantial and material cost, would materially delay entrance by competitors into the local

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[105] The Commission expressly found that unbundled provision of operator services and directory assistance do not raise any proprietary concerns. *See Local Competition Order*, ¶ 539.

[106] *See Local Competition Order*, ¶ 534.

[107] 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III).

market, and would, therefore, materially limit access by consumers to the new competitive services that ultimately may be provided by new entrants.[108]

B. TO AVOID ANY FURTHER DELAY IN EXERCISING REQUESTING CARRIERS' RIGHTS TO COMBINATIONS, THE COMMISSION SHOULD EXPLICITLY MANDATE THE PROVISION OF UNE-P, EXTENDED LINK AND OTHER COMBINATIONS

The Commission has already concluded that "[t]he ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition in the local telecommunications market."[109] It must now take the next logical step by affirming that ILECs are required to provide access to UNE combinations, including the UNE platform and the Extended Loop, without restriction. In addition, the Commission should implement those requirements by prohibiting ILECs from imposing any restrictions on combinations, which would be contrary to the statute and the Commission's rules. The Commission must require unrestricted access to UNE combinations to promote competitive local telecommunications markets.

Any possible doubts as to the Commission's authority to require ILECs to provide access to combinations of UNEs was put to rest in the *AT&T v. Iowa Utils. Bd.* decision. In reinstating Rule 315(b), which prevents ILECs from separating UNEs that are already combined in their networks, the Court made clear that UNEs must be made available to competitors *in*

108 Today, alternative providers of OS/DA services are critically dependent upon access to ILEC-controlled databases for current subscriber information. Until these databases become available on nondiscriminatory terms to competitive providers, carriers will continue to be impair without access to the ILEC's OS/DA capabilities.

109 *FNPRM*, ¶ 2.

combinations.[110] The Court recognized that Rule 315(b) entitles entrants to obtain "an entire preassembled network" through UNE combinations.[111] That "truth," together with the Court's validation of the Commission's all elements rule, confirms that competitors have a right to obtain and use UNE combinations and to provide any telecommunications services entirely through UNE combinations, *i.e.*, via the UNE platform. Therefore, the Commission should clarify and re-affirm that ILECs are obligated to provide unrestricted access to all technically-feasible UNE combinations, including the UNE Platform and the Extended Loop, on nondiscriminatory terms.

If genuinely competitive local markets are to be realized, the Commission must prohibit ILECs from restricting CLECs' access to and use of UNE combinations. Otherwise the ILECs will continue to impede competitive entry by imposing restrictions on the ability of entrants to provide services through UNE combinations. In proceedings in New York and New Jersey, for example, Bell Atlantic has sought restrictions on: which elements would be available in combination, which services CLECs could provide over particular combinations, which classes of customers could be served using the combinations, which geographic areas could be served using the combinations, and how long the combinations would be available to CLECs.[112]

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110 *AT&T Corp.*, 119 St. Ct. at 736. An inconsistency was created when the 8th Circuit struck the Commission's pre-existing combination rule, 315(b), and new combination rules, 315(c)-(f), and the Supreme Court reversed only the pre-existing combination rule before it, 315(b). Pursuant to the Supreme Court's wholesale rejection of the 8th Circuit's combination analysis, the Commission and CompTel have asked the 8th Circuit to reinstate or remand Rules 315(c)-(f), so the Supreme Court's decision regarding the Commission's combination rules will apply consistently to both pre-existing and new combinations. However, the Commission should take this opportunity to re-adopt "new" rules similar to 315(c)-(f) requiring ILECs to provide new UNE combinations wherever technically feasible.

111 *Id.* at 736.

112 Another anti-competitive practice by the ILECs is the assessment of so-called "glue charges" on combinations. There is no legal or rational basis for the imposition of glue charges. ILECs incur no legitimate costs in combining UNEs that are already combined, and the ILECs themselves provide service to their own customers via combinations
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These restrictions – indeed, any restrictions – on combinations will reduce the number of customers to whom competitors are able to provide service.

In order to demonstrate this, CompTel attaches hereto a profitability analysis comparing the average profitability of serving typical multi-line business customers in New York.[113] Notably, the analysis is intentionally skewed to be conservative, including in its selection of multi-line business customers (with their higher average revenues) and several assumptions concerning CLEC costs.[114] Thus, the analysis is a "best case" for the ILECs' arguments that facilities deployment may be used for mass market applications. However, the analysis shows that even under the ILECs' best case scenarios, only UNE-P presents a viable mass market strategy.[115]

This judgment is confirmed by the experiences of CompTel member companies. For example, Birch Telecom, which has experience with all three methods analyzed in Appendix B, has found that the number and scope of customers it is able to serve is significantly higher in Texas than elsewhere, because UNE-P is available in Texas.[116] Similarly, Z-Tel's implementation plan *requires* the availability of UNE-P and it is rolling out the service only where such an option is made available.[117]

(…continued)
without incurring any such costs. Further, any cost-based charges for the initial installation of UNEs is already included in the charge for those UNEs.

113 Profitability Analysis, attached as *Appendix B*.

114 *Id.*

115 *Id.* UNE-P provides an average profitability margin of 17.7%. By contrast, loop resale (facilities deployment) is at best a break even proposition, with a margin of 1.9%, while 251(c)(4) resale results in a net loss for the carrier.

116 Tidwell Aff., ¶ 7.

117 Malfara Aff., ¶ 8-9.

These problems are exacerbated where carriers must serve customers with multiple locations. In order to serve such customers, the carrier must be able to provide service *wherever* the customer is located, which requires the availability of UNE-P and other combinations.[118] As Jerry James of Golden Harbor put it, CLECs need the ability to serve customers where the customers need service (not where the CLEC has deployed facilities).[119] Any restrictions on the availability of UNE-P and other combinations impedes a carrier's ability to serve its customers' needs.

The Commission would not be breaking new ground to prohibit these sorts of restrictions. Rule 309 makes clear that ILECs may not impose any "limitations, restrictions, or requirements on requests for, or the us of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."[120] The rule clearly provides that it is the requesting carrier, *not the ILEC*, who determines whether and how to use UNE combinations to provide service. The fact that ILECs have sought to restrict CLECs' access to and use of combinations in face of this rule underscores the need for explicit prohibitions on such restrictions.

It is imperative that the Commission mandate unrestricted access to combinations because they represent the only realistic option for competitive carriers to obtain "last-mile" connectivity to a wide range of potential customers. Viable connectivity to all customers is crucial to effective competition and especially important for residential and rural users. The relatively few CLEC facilities currently in place were designed primarily to serve those

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118 Arias Aff., ¶ 6; Tidwell Aff., ¶ 6.

119 James Aff., ¶ 4.

customers whose high traffic volumes economically justify the deployment of facilities. At present, there simply is no economic rationale for building last-mile facilities to most, if not all, lower volume local telephone users or subscribers in sparsely-populated areas. As a result, UNE combinations are fundamental for sustained local market entry if that market is to include access to a truly broad customer base.

Promoting widespread distribution of the benefits of a competitive market to a broad customer base, including all classes of users in all geographic areas, can only be achieved through unrestricted access to UNE combinations (loops, switching and transport) known as the UNE platform. The platform maximizes the ability of CLECs to enter the mass market efficiently. Such mass market competition is essential to those carriers seeking to offer regional or national integrated service offerings. The platform also enables CLECs employ technological innovations to provide advanced network functionalities and capabilities rapidly. Accordingly, unrestricted access to the platform is critical to the ability of CLECs to provide service to a broad customer base while offering services, prices, and capabilities that differ from ILEC offerings.

In addition, unrestricted access to the Extended Loop is also vital to the development of competitive local markets. The Extend Loop is a highly efficient way for switch-based CLECs to extend the geographic range of their service offerings. Using the Extended Loop, CLECs may provide service to distant customers without having to incur the costs, delays, and problems associated with trying to collocate in every central office necessary to serve those distant customers. The Extended Loop enables switch-based CLECs an economic means of serving some customers beyond the central offices in which they are collocated. While the Extended Loop is an important option for the ability of switch-based CLECs to reach a broad

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(...continued)

[120] 47 C.F.R. §51.309(a).

range of customers, it may not be able to spur the development of truly mass-market competition to all subscribers because CLECs utilizing the Extended Loop must still endure a manual cutover of each customer and other charges. Therefore, the Extended Loop should be considered to be a UNE combination that is complementary to, rather than a substitute for, the UNE platform.

Unrestricted access to both the UNE platform and the Extended Loop prevents CLECs from being forced to collocate with the ILECs on a massive scale to gain access to UNEs. Mandatory collocation would only exacerbate the already significant problem of exhaustion of suitable collocation space in central offices. Further, forcing CLECs to collocate to gain access to UNEs would impose substantial, if not prohibitive, financial burdens upon their ability to obtain sufficient access to the UNEs they wish to use. As already recognized by the Commission, the Department of Justice, and a number of state commissions, imposing such financial burdens upon CLECs through mandatory collocation is discriminatory and unwarranted.[121] Certainly, forced collocation would eliminate the ability of CLECs to provide competing local services to subscribers other than the highest-volume business customers in dense urban areas. Unrestricted access to combinations, including the platform and the Extended

[121] *See Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Services in Louisiana*, Memorandum Opinion and Order, Federal Communications Commission, CC Docket No. 98-121 (rel. October 13, 1998); *Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Services in Louisiana*, Federal Communications Commission, CC Docket No. 98-121, Evaluation of the United States Department of Justice (filed August 19, 1998); *Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts, et al., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements Between Bell Atlantic—Massachusetts and the Aforementioned Companies*, DPU/DTE 96-73/74, 96-75, 96-83, 96-94, Phase 4-E (Mass. Dept. of Pub. Utils., March 13, 1998); *Application and Complaint of MCI Metro Access Transmission Services, Inc., against Ameritech Michigan Requesting Non-Discriminatory, Efficient and Reasonable Use of Unbundled Loops Using GR303 Capability*, Opinion and Order, Case No. U-11583 (Mich. Pub. Serv. Comm'n, June 3, 1998).

Loop, removes the need for CLECs to undertake the daunting task of collocating in the serving central office for every single customer for whom they wish to compete.[122]

V. THE COMMISSION SHOULD ESTABLISH ORDERLY PROCEDURES FOR THE CONSIDERATION OF REMOVAL OF UNES

A. THE COMMISSION MUST RETAIN SOLE AUTHORITY TO REMOVE NATIONWIDE UNES FROM THE LIST

State commissions must not be permitted unilaterally to remove a UNE from the nationwide list for the same reasons they should not be permitted to decide which UNEs must be unbundled in the first place – doing so nullifies the benefits of adopting minimum nationwide rules. These benefits are inextricably tied to the industry's understanding that a list of minimum UNEs *will be uniformly available* pursuant to the FCC's decision in this proceeding. Allowing states to remove UNEs on their own would inevitably lead to the Balkanization of the unbundling rules among the states. Even before any state actually removed a UNE from the list, the mere possibility that UNEs could be removed on a state-by-state basis would eliminate the certainty and efficiency of nationwide rules. Accordingly, the Commission must adopt truly nationwide unbundling rules, namely, a list of minimum available UNEs that cannot be whittled away by state commissions acting on their own accord.

B. THE COMMISSION SHOULD ADOPT A PROCEDURE FOR EXAMINING UNES THAT INCLUDES INPUT FROM STATE COMMISSIONS

As competition in the local exchange develops, UNEs may no longer need to be included on the minimum nationwide list. The Commission should, therefore, adopt a procedure for removing UNEs from the nationwide list. Such a procedure should be analogous to a highly

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122 Even assuming, *arguendo*, that a CLEC could secure an ideal collocation environment, it would remain dependent upon manual methods for provisioning service to customers, placing it at a competitive disadvantage relative to the ILECs.

streamlined version of the Section 271 application process. To begin the process, the FCC should determine, for a particular network element, that the interchangeability criteria has been satisfied. Since this finding is likely to depend upon ILEC-wide, regional (or, perhaps, for some network elements such as OS/DA, national) conditions, this decision should be made by the FCC.

Evaluating wholesale conditions in any individual market, however, should also involve the input from states. The suggested process should consist of two basic steps. First, an ILEC would petition a state commission for a ruling that specific local circumstances have removed the need for mandatory access to a particular ILEC UNE. The state commission would develop and consider the record presented by the ILEC to render an opinion on the petition, pursuant to the criteria established in this proceeding. This process should be governed by explicit guidance form the FCC concerning, for example, the type of evidence that is necessary to demonstrate a wholesale market is indeed in place.[123]

Assuming that a state issues a favorable opinion on the ILEC petition, ILEC would next petition the FCC to remove the UNE from the minimum list, presenting the state commission's opinion and the record developed thereunder. The FCC would then render a final decision on whether the UNE should in fact be removed from the nationwide list in the specified market locations. Procedurally, this step process would be similar to the Section 271 procedure, albeit a greatly pared-down version.

[123] UNEs should be removed based on a geographic market no smaller than the market used by the Commission to evaluate impairment in the first place.

C. THE COMMISSION MUST PROVIDE AN ORDERLY TRANSITION FOR UNES THAT ARE REMOVED FROM THE NATIONWIDE LIST

Upon a Commission determination that a particular UNE should no longer be unbundled, that UNE should undergo a "phase out" period, during which it would remain available, in order to avoid market disruption. CLECs must have a minimum period before that UNE becomes unavailable to them to take whatever steps are necessary to continue the provision of service as a result of losing access to that UNE. CLECs will need to make alternative arrangements to provide service without access to a UNE that is removed from the nationwide list. The alternative – allowing the ILECs to immediately cease unbundling a UNE as soon as it is removed from the list – would put CLECs at a great competitive disadvantage because the ILECs, and their customers, would never face the possibility that a particular UNE that is critical to their business plan may be yanked away from them before they could have alternative arrangements in place.

Such a phase out period must be sufficient to allow CLECs the practical ability to reconfigure their operations without degrading or disrupting service to their customers. This period must take into account the length of time required to obtain alternative network arrangements from the ILECs. However, provisioning intervals have been a significant point of contention among parties and state commissions. Disagreements have arisen as to what the appropriate intervals should be, the frequency of missed provisioning intervals and what the consequences for missed intervals should be. One conclusion is clear, it takes time to configure, order, obtain, and deploy UNEs taken from the ILEC. The Commission should consider that such ILEC provisioning intervals should be the minimum time required for CLECs to ensure that they can obtain and implement substitutable service without customer disruption.

It is also crucial that ILECs continue to honor existing interconnection agreements until their expiration. CLECs have invested substantial resources in negotiating, arbitrating, and implementing their current interconnection agreements. They, and their investors, committed these resources with an expectation of reliance upon these agreements. As contemplated by the Act, the FCC, and state commissions, CLECs and ILECs have looked primarily to their agreements to arrange their operations. These agreements are complex documents that embody the interconnecting parties' "give and take" on great number of interrelated pieces of their relationship. Both CLECs and ILECs expended the resources to develop these agreements under a regime of a nationwide minimum list of available UNEs that does not allow currently for the removal of one or more of those UNEs from the list. It would be patently unfair and a waste of the substantial resources already committed to local competition to allow ILECs to ignore fundamental obligations in their current interconnection agreements. Therefore, the Commission should adopt rules that require ILECs to continue to unbundle, at a minimum, those UNEs identified in their existing agreements.

In addition, all reconfiguration, early termination and non-recurring charges should not apply or should be waived for CLECs that are forced to transition from a UNE that becomes unavailable as a result of being removed from the nationwide list. Upon removal from the list, ILEC provisioning of such a UNE would be left to the discretion of the individual ILEC. If an ILEC voluntarily chooses to cease making that UNE available, it should bear the cost of seeking to change the parties' relationship. CLECs already will be forced to incur the costs of making alternative business and operational arrangements to accommodate the unavailability of the UNE. The CLEC should not be forced to pay the additional transition costs for a network change initiated by the ILEC. The Commission's UNE rules must require that ILECs bear the costs of their voluntary network changes.

The rules adopted by the FCC should also grant CLECs a right to petition the Commission for waiver of any determination that access to a particular UNE should no longer be available. Such a right to petition for continued access to the UNE would allow CLECs the opportunity to demonstrate that removal of the UNE under specific conditions or in specific locations is inappropriate. This right would provide an important "backstop" for CLECs before the significant step of actually losing access to a UNE takes place. This procedural right would be especially important in smaller and rural markets that may be subsumed into locations that successfully remove a UNE from the nationwide list, but where true competitive alternatives to the UNE may not be realized sufficiently. In such markets, local competition would suffer a disadvantage if CLECs are not allowed to demonstrate unique circumstances that require continued access to a particular UNE.

VI. CONCLUSION

For the foregoing reasons, the Commission should act promptly to redefine UNEs in furtherance of the Act's goal of robust local competition. It should interpret the terms "necessary" and "impair" to promote the objectives of lowering entry barriers and encouraging the widespread introduction of competition for end user customers. Applying these standards, it should define the UNEs described above and mandate their availability on a national basis.

Respectfully submitted,

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